No. ~~17303~~ 17053

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN RUSSELL HANSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 17503

IN THE

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FOR THE NINTH CIRCUIT

JOHN RUSSELL HANSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

On October 15, 1958, appellant was charged by the grand jury in a 22 count indictment under the provisions of Section 287 and 495 of Title 18 United States Code. [C. T. 15-36.][1]

On December 5, 1958, appellant represented by counsel was convicted after a jury trial on 21 counts of this 22 count indictment.[2] [C. T. 10, 37.]

On December 5, 1958, appellant was sentenced to a total of twenty-eight years imprisonment. [C. T. 37.]

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[1]C. T. whenever used in this brief refers to the Clerk's Transcript.

[2]Count 1 of the indictment was dismissed by the court because of a jury error in returning the verdict.

The jurisdiction of the United States District Court to entertain the action was founded upon Section 3231, Title 18, United States Code.

Appellant represented by counsel appealed from the judgment of conviction. The Circuit Court of Appeals for the Ninth Circuit affirmed appellant's conviction in 271 F. 2d 791. (Ninth Circuit 1959.)

On June 1, 1960, the Honorable Judge Ernest A. Tolin denied petitioner's motion brought under Section 2255 of Title 28 United States Code to vacate judgment and correct sentence on the 8 counts of the indictment charging offenses within the Northern Division of the Southern District of California. [C. T. 10-14.]

This is an appeal from Judge Tolin's order denying appellant's motion to vacate sentence and judgment. [C. T. 10-14, 38.] Jurisdiction of the court of appeals to entertain this matter rests pursuant to Title 28 United States Code Sections 1291, 1294 and 2255.

II.

Statement of Case.

On December 5, 1958, appellant was convicted on a total of 21 counts of a 22 count indictment after a trial before the United States District Court for the Southern District of California, Central Division, the Honorable Ernest A. Tolin presiding. [C. T. 37.] Fourteen counts of the indictment charge offenses occurring within the Central Division of the Southern District of California,[3] while the remaining 8 counts charge unlawful activities occurring within the North-

[3]Counts 1, 4, 5, 6, 9, 10, 11, 14, 15, 16, 17, 18, 19 and 22.

ern Division of the Southern District of California.[4] [C. T. 15-36.] A reading of the indictment and the record in this case indicates that the activities specified in all 22 counts of this indictment were part of a common plan or design formulated by the appellant.

Appellant's present motion under Section 2255 of Title 28 United States Code attacks the validity of the judgment on only those 8 counts of the indictment charging offenses committed within the Northern Division of the Southern District of California. These counts effect nine years of appellant's total sentence of 28 years imprisonment.[5] [C. T. 37.] The remaining 19 years of the appellant's sentence are not questioned on this appeal.

Appellant's present objection as to venue was not raised during the District Court proceedings and was not even alluded to when appellant appealed from his District Court conviction. Different counsel represented appellant at the trial and appellate levels of this case.

III.
Question of Law Involved.

Does the appellant, represented by counsel, waive any objection as to venue when he fails to object either at trial or during his subsequent appeal to being tried in one particular division of a district rather than another.

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[4]Counts 2, 3, 7, 8, 12, 13, 20 and 21.

[5]Judge Tolin ruled that the sentences should run consecutively on the following counts alleging offenses occurring within the Central Division of the Southern District of California. Count 4, 1 year; count 5, 1 year; count 6, 5 years; count 9, 1 year; count 10, 1 year; count 11, 1 year; count 14, 1 year; count 15, 1 year; count 16, 5 years; count 19, 1 year and count 22, 1 year. The total sentence imposed for these counts is 19 years.

IV.
ARGUMENT.

A. Venue Is a Procedural Matter and May Be Waived.

The constitution of the United States grants the accused the right to a trial in the state and district in which his offense was committed,[6] and the Federal Rules of Criminal Procedure authorize trial in the division of the district where the alleged crime occurred.[7] The existence of these rights afforded the appellant in a criminal trial are not in issue on this appeal. The only questions presently before the court are whether venue may be waived and, if so, when.

The courts have consistently held that an appellant may waive his constitutional right to a trial in the state and district in which the alleged offense was committed.[8]

In *United States v. Gallagher, supra,* the Court said in referring to the venue provisions of the Sixth Amendment and Article 3, Section II, Clause 3 of the United States Constitution:

> ". . . the venue specified by these provisions, like other venue provisions, is a procedural right, which, while in the broad sense for the protection of the public generally, is in a very special sense a privilege accorded to the individual member of

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[6]Article 3, Section 2, Clause 3 and the 6th Amendment of the United States Constitution.

[7]Federal Rules of Criminal Procedure, Rule 18.

[8]*United States v. Gallagher,* 183 F. 2d 342, 346 (3rd Cir. 1950); *Lafoon v. United States,* 250 F. 2d 958 (5th Cir. 1958); *Walker v. United States,* 218 F. 2d 80 (7th Cir. 1955); *Stoppelli v. United States,* 183 F. 2d 391 (9th Cir. 1950).

the public who has been accused of crime. Accordingly, as in the case of the other procedural privileges conferred upon accused persons by these particular clauses of the Constitution, *the venue privilege may be waived by an individual defendant.*" (Emphasis Added.)

The cases also uniformly hold that a defendant may waive his statutory right to a trial in a particular division of a specified district.[9] In *Bistram v. United States,* 253 F. 2d 610 (8th Cir. 1958) the appellant argued that the Southeastern Division of the District Court of North Dakota was without jurisdiction to impose the judgment and sentence inasmuch as the offense was alleged to have been committed in the Southwestern Division of the District. The Court in rejecting appellant's claim quoted Rule 18 of the Federal Rules of Criminal Procedure and then stated:

> " . . . however, it is well settled that this [Rule 18] is a venue privilege which may be waived by the accused."

B. The Appellant Waives Any Objection He Might Have Had to Being Tried in One Division of a District Rather Than Another When He Fails to Take Exception to Venue Either at Trial or During His Direct Appeal.

Waiver of venue has been considered in numerous cases, the vast majority where the defendant raised the venue point for the first time on his direct appeal. In the instant matter defendant, represented by coun-

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[9]*Bistram v. United States,* 253 F. 2d 610 (8th Cir. 1958); *United States v. Cohoate,* 276 F. 2d 724 (5th Cir. 1960); *Walker v. United States,* 218 F. 2d 80 (7th Cir. 1955).

sel, not only did not raise the venue point at trial but never even mentioned venue during the subsequent appellate proceeding, resulting in the affirmation of the District Court conviction.

Uniformly the courts have held that a defendant waives his objection as to venue by going to trial on the merits, or by not objecting to the place of the trial until after the Government has completed its case. In fact the cases held venue is waived even where, by a defect in the charge, venue is not observable from a reading of the indictment.[10]

In the present case there is even more reason to hold that defendant has waived any possible objection to venue. Here, the indictment on its face discloses venue of the court was in another division as to eight counts of the indictment, now under attack. Regardless of this, the defendant did not object or raise this point until this late date. This Circuit has already held in a similar case, *Rodd v. United States,* 165 F. 2d 54 (9 Cir. 1947), that objections to venue are waived by the failure to object during trial where the indictment shows on its face that venue is not properly laid. Also see, *United States v. Brothman,* 191 F. 2d 70. (2 Cir. 1951.)

The cases cited by the appellant are not relevant to the issues of this appeal. The *Borow* and *Johnson* cases[11] do not involve the question of venue, the deci-

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[10]*Stoppelli v. United States,* 183 F. 2d 391, 395 (9th Cir. 1950); *Thomas v. United States,* 267 F. 2d 1 (5th Cir. 1959); *United States v. Fabric Garment Co.,* 262 F. 2d 631, 641 (2nd Cir. 1958).

[11]*United States v. Borow,* 101 Fed. Supp. 211 (D.C.N.J. 1951); *United States v. Johnson,* 323 U. S. 273 (1944).

sive issue in this appeal. *United States v. Jones,* 174 F. 2d 746 (7th Cir. 1949), deals solely with the sufficiency of evidence necessary to prove venue, a point not in issue in the current proceeding.

V.
Conclusion.

The question of whether the trial of a Federal offense should be in one particular district or division rather than another is solely a matter of venue and does not raise any jurisdictional problem. Uniformly, courts have held that an appellant may waive non-jurisdictional claims such as the alleged impropriety of trial in one division or district rather than another. Since the record in the instant case indicates the appellant did not raise any venue question at his trial or at any time during his subsequent appeal, the appellant is deemed to have waived any question concerning the propriety of being tried on all counts of his indictment in the Central Division of the Southern District of California.

Respectfully submitted,

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